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Case No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

KEITH and MARY HALL,

Petitioners,

v.

INDIANA DEPARTMENT OF STATE REVENUE

and KENNETH L. MILLER, Commissioner,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When does "jeopardy" attach in a nominally civil action that has been determined to be punitive and therefore subject to a Double Jeopardy analysis so as to prohibit the imposition of a second jeopardy.

2. Whether the requirements of 26 U.S.C. § 6050I that require the Indiana Department of State Revenue to complete Internal Revenue Form 8300 renders I.C. 6-7-3 (Indiana's Controlled Substance Excise Tax) violative of the Fifth Amendment's protection against self-incrimination in that the payor of the tax is compelled to disclose the identity of the possessor of the controlled substance.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceedings in the Supreme Court of Indiana are included in the caption. In compliance with Rule 29.1 it is noted that there are no parent companies or subsidiaries of any corporations involved in this matter.

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Petitioners Keith and Mary Hall respectfully seek a writ of certiorari to review the judgment of the Supreme Court of Indiana in this case.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is published in *Hall v. Indiana Department of State Revenue* 660 N.E.2d 319 (Ind. 1995) and reproduced in the Appendix at page 1. The opinion of the Indiana Tax Court is published in *Hall v. Indiana Department of State Revenue* 641 N.E.2d 694 (Ind. Tax 1994) and reproduced in the Appendix at page 114.

BASIS FOR JURISDICTION

This petition for a writ of certiorari seeks review of the Supreme Court of Indiana's judgment of December 27, 1995. Jurisdiction is conferred upon the United States Supreme Court by 28 U.S.C. § 1257

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions involved are the Double Jeopardy and Self-Incrimination Clauses of the Fifth Amendment to the United States Constitution and portions of Indiana's Controlled Substance Excise Tax (CSET), as well

as Indiana Tax Court procedural statutes and Internal Revenue Code provisions. Citation to those statutes follows. The statutes are reproduced verbatim in the Appendix beginning at page 177.

U.S. Const. Amend. V

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself * * *."

Indiana Controlled Substance Excise Tax Statutes

6-7-3-1 "Controlled substance" defined

6-7-3-3 "Department" defined

6-7-3-5 Imposition of tax; exemption

6-7-3-8 Payment of tax due on violation of state or federal laws, non-disclosure of identity of taxpayer

6-7-3-9 Payment of tax not conferring criminal

immunity; use of confidential information

6-7-3-11 Prohibited acts; failure or refusal to pay tax; penalty; crimes and offenses; exemption

6-7-3-13 Jeopardy assessment; duties of the department

6-8.1-1-1 "Listed taxes" or "taxes"

6-8.1-7-1 Disclosure of information

6-8.1-7-3 Violation; offense

33-3-5-11 Tax appeal or injunction; petition; injunction pending appeal

Internal Revenue Code Provisions

26 U.S.C. § 6050I Returns relating to cash received in trade or business, etc.

26 U.S.C. § 7203. Willful failure to file return, supply information, or pay tax.

STATEMENT OF THE CASE

On February 12, 1993, police searched the home of Petitioners Keith and Mary Hall and recovered approximately 300 pounds of marijuana. The Halls were arrested and charged with possession of the marijuana. On February 16, 1993, the Indiana Department of State Revenue assessed the Controlled Substance Excise Tax (CSET) against the Halls in the amount of $5,691,320 pursuant to I.C. 6-7-3, *et seq.*. The Department also imposed the statutory 100% penalty as provided by in I.C. 6-7-3-11(a) for an initial tax liability of $11,382,640. On the same day, the Marion County Sheriff's Department garnished Mary's wages and seized the Hall's property as partial payment on the CSET liability. On November 19, 1993, Keith Hall was convicted of the charge of possessing the marijuana. All criminal charges against Mary Hall were dismissed.

Indiana Tax Court

On February 22, 1993, the Halls, protested the tax assessment by letter (see appendix at page 167) to the Department and their protest was denied on May 25, 1993

(see appendix at page 169). The Hall's sought *de novo* review in the Indiana Tax Court by filing a Petition to Set Aside Final Determination (Original Tax Appeal) (reproduced in pertinent part in the Appendix at page 171) on the grounds that the imposition of the CSET after Keith Hall's criminal conviction was in violation of the Double Jeopardy Clause (See ¶6(b)) and alleging that being required to pay the CSET violated their privilege against self-incrimination (See ¶6(a)). By way of a Motion For Partial Summary Judgment filed on January 14, 1994 the Halls further raised the federal questions concerning the Double Jeopardy Clause and the Self-Incrimination Clause in the Indiana Tax Court. A reproduction of relevant portions of the Motion is included in the Appendix at page 173. The Double Jeopardy Clause issue is raised at ¶1(b) and the Self-Incrimination Clause issue is raised at ¶1(a). On October 11, 1994, the Indiana Tax Court held that the CSET was a jeopardy relying on *Montana Department of Revenue v. Kurth Ranch*, __U.S.__, 114 S. Ct. 1937 (1994) and set aside Keith Hall's

tax assessment as he had already suffered a first jeopardy by virtue of the criminal conviction entered on November 19, 1993. The Indiana Tax Court further ruled that the CSET did not violate the Hall's rights against self-incrimination as the tax could be paid by an agent, rather than the possessor of the controlled substances, and the confidentiality provisions of the CSET and other tax related statutes prohibited the Indiana Department of State Revenue from disclosing any information obtained from the payor of the CSET, therefore, there was no "real and appreciable" risk of self-incrimination in paying the CSET. The opinion of the Indiana Tax Court is published in *Hall v. Indiana Department of State Revenue* 641 N.E.2d 694 (Ind. Tax 1994) and reproduced in the Appendix at page 114. That decision adopts the decision in the related case of *Clifft v. Indiana Department of State Revenue* 641 N.E.2d 694 (Ind. Tax 1994), a copy of which is reproduced in the appendix at page 120.

Supreme Court of Indiana

By way of a Petition For Review (relevant parts of which are appended hereto at page 175) filed on November 10, 1994, in the Supreme Court of Indiana, the Halls sought review of the Tax Court's decision specifically renewing their Self-Incrimination Clause claim at ¶1(a). The Department of State Revenue also sought review of the Tax Court decision regarding the applicability of *Kurth Ranch* and the timing of the attachment of jeopardy. On December 27, 1995, by way of published decisions in this and the related cases of *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995) and *Clifft v. Indiana Department of State Revenue*, 660 N.E.2d 310 (Ind. 1995) (both of which are reproduced in the Appendix at pages 13 and 83 respectively), the Supreme Court of Indiana agreed with the Tax Court that the CSET was a jeopardy under *Kurth Ranch*. However, the Supreme Court of Indiana held that because the mere assessment of the CSET created a judgement against the Halls which allowed the Department of State Revenue to immediately seize assets, garnish

wages, and levy bank accounts, the CSET was the first jeopardy that attached when the Department issued the Febraury 16, 1993 assessment. Because jeopardy in the criminal case did not attach until Keith Hall's conviction on November 11, 1993, the imposition of the CSET jeopardy was upheld and the Tax Court was reversed.

With regards to the Self-Incrimination claim, the Supreme Court of Indiana, by reference to the related case of *Clifft*, adopted the Tax Court's decision that the CSET could be paid by an agent of the possessor of the controlled substances and that the confidentiality provisions of the CSET and other statutes prohibited Department employees from disclosing any information obtained from the payor of the CSET, thus no "real and appreciable" risk of self-incrimination existed.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Indiana Has Wrongly Decided an Important Federal Question Which Has Not Been Decided By This Court But Should Be As the

Question Concerns Issues Of Public Importance Being Litigated In Federal and State Courts Across the United States.

The Supreme Court of Indiana in this case correctly found that the Controlled Substance Excise Tax (CSET) was punitive and subject to the constraints of the Double Jeopardy Clause under this Court's holding in *Montana Department of Revenue v. Kurth Ranch* __ U.S.__ (1994). However, the Supreme Court of Indiana's decision that the mere administrative assessment of the CSET was the point at which that jeopardy attached, thus precluding further prosecution as a second jeopardy, is inconsistent with this Court's precedent regarding the timing of the attachment of jeopardy. The precise issue raised by this case, the timing of the attachment of jeopardy in a nominally civil action, is one of significance throughout the country as this Court has recently established that jeopardy can attach in non-criminal actions such as forfeiture and drug tax cases but has not yet determined when that jeopardy attaches.

a) The Supreme Court of Indiana has decided an issue of federal law of first impression in a manner that is inconsistent with this Court's earlier decisions concerning the attachment of jeopardy in criminal cases.

This Court's history in cases determining when jeopardy attaches in criminal prosecutions has unerringly and consistently held that jeopardy does not attach until there is a risk of punishment. *Serfass v. United States*, 420 U.S. 377 (1975); *Breed v. Jones*, 421 U.S. 519 (1975); *Abney v. United States*, 431 U.S. 651 (1977). Consistent with that reasoning, when a mistrial is declared at the request of the accused or for "manifest necessity" a retrial can be had because the accused has never risked punishment. *United States v. Dinitz*, 424 U.S. 600. The risk of punishment has been uniformly determined to exist in a bench trial when the first witness is sworn and in a jury trial when the jury is sworn as at those points the accused is "put

to trial before the trier of facts" and truly risks a determination of guilt. *Serfass*, supra. Absent such an appearance before a "trier of fact" jeopardy cannot attach.

In *Bryant v. State* 660 N.E.2d 290 (Ind. 1995), the Supreme Court of Indiana first held that the CSET was punitive under *Kurth Ranch* and then held that jeopardy attaches in a CSET case upon the issuance of the tax assessment because at that point the accused had already been found guilty of owing the tax. *Id.* t 299.("We conclude that jeopardy first attached when the Department served Bryant with its Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. At that moment, Bryant faced more than a risk of being found guilty; he had actually been found guilty."). The *Bryant* Court attached great importance to the fact that the CSET assessment was a judgment that allowed the Department of State Revenue to levy on Bryant's property immediately. *Id.* This determination by the Supreme Court of Indiana ignores the fact that the accused has the immediate right to protest the assessment

in an administrative hearing and enjoin further collection of the tax prior to initiating an appeal of the administrative decision in the Indiana Tax Court pursuant to I.C. 33-3-5-11(b) and Tax Court precedent (See *American Trucking Ass'n v. State*, 512 N.E.2d 920, (Ind. Tax 1987), and, most importantly, the fact that the original tax appeal in the Indiana Tax Court is heard *de novo*. *Indiana Waste Systems of Indiana v. Indiana Department of State Revenue* 633 N.E.2d 359, (Ind. Tax 1994).

The existence of *de novo* review where the Tax Court is bound by neither the issues nor the evidence in the administrative protest proceedings essentially makes the administrative proceedings a nullity where there is no true risk of punishment as any finding can be entirely relitigated in Tax Court and any issues not previously presented can be raised. While it is true that the issuance of the CSET assessment does allow the Department to levy on property, the accused has the immediate right to put a stop to any collection efforts and can contest the assessment informally

with minimal effort. The Tax Court sitting *de novo* is the first "trier of fact" the accused stands before and at the initiation of the receipt of evidence on the factual issues necessary for the finding of tax liability in that proceeding is where jeopardy attaches.

By analogy to a criminal prosecution, the issuance of a CSET assessment is the mere filing of charges where, upon a finding of probable cause, the accuser's liberty may be restrained but he can be free upon the posting of bail. The issuance of a CSET assessment allows, but does not require, the property of the accused to be restrained but the availability of a protest hearing and injunctive relief from further collection efforts allows the property to be "free on bail" pending an appearance before the trier of fact in the Tax Court.

b) The issue of the timing of the attachment of jeopardy in a nominally civil action that has been determined to constitute jeopardy is an issue of significance throughout the courts in the United States.

This Court has established that jeopardy can attach in nominally civil cases such as actions for civil fines, forfeitures, and drug tax matters. (See *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, __ U.S. __, 113 S.Ct. 2801 (1993);and *Kurth Ranch*, supra.) but this Court has not yet established when jeopardy attaches in a "civil" case. This issue is of great importance as attempts to impose civil fines, forfeitures, and drug taxes are rampant in the state and federal courts and are often proceeding simultaneously against the same person seeking to sanction the same misconduct. Without guidance from this Court as to when jeopardy attaches in a forfeiture or drug tax case, the lower courts are left to decide this issue without guidance and valuable resources of courts, administrative agencies, and prosecutors are perhaps being needlessly duplicated and wasted if a particular proceeding is voided as a second jeopardy. As Chief Justice Shepard noted in *Bryant*, only a few courts have addressed when jeopardy

attaches in a civil proceeding and the Supreme Court of Indiana was writing on a clean slate. *Bryant*, supra. at 298.

Acceptance of certiorari in this matter will provide this Court with an opportunity to fill that clean slate and establish when jeopardy attaches in civil matters.

2. The Supreme Court of Indiana Has Decided an Important Federal Question in a Manner that Conflicts With Applicable Decisions of This Court.

The Supreme Court of Indiana's decision that the CSET does not violate the Hall's privilege against self-incrimination conflicts with this Court's decisions in *Albertson v. Subervisive Activities Control Board* 382 U.S. 70 (1965); *Marchetti v. United States* 390 U.S. 39 (1968); *Grosso v. United States* 390 U.S. 62 (1968); *Haynes v. United States* 390 U.S. 85 (1968) and *Leary v. United States* 395 U.S. 6 (1969) because the CSET creates a "real and appreciable" risk of self-incrimination when the tax to be paid is in excess of $10,000. The line of self-incrimination cases cited above

established a three part test for determining whether a self-reporting requirement such as the CSET violates the privilege against self-incrimination. Such a scheme is unconstitutional if 1) the activity being regulated is an area permeated with criminal statutes; 2) the regulations are aimed not at the public at large but at individuals who are inherently suspect of criminal activities; and, 3) compliance with the requirements poses a real and appreciable risk of self-incrimination. The Supreme Court of Indiana, utilizing a slightly different but essentially similar framework, correctly found that the CSET satisfied the first two prongs of the test. However, because the CSET could be paid by an agent (not the person in possession of the controlled substances) and did not require the payor to reveal any identifying information, and because any information revealed could not be divulged by the Indiana Department of State Revenue to any law enforcement agencies, the Supreme Court of Indiana held that there was no real and appreciable risk of self-incrimination.

If the CSET liability due does not exceed $10,000 the Indiana Supreme Court's decision is clearly correct. If, however, the CSET liability exceeds $10,000 (which the Hall's did by many times) the CSET cannot be paid, even by an agent, without the Indiana Department of State Revenue being required to comply with 26 U.S.C. § 6050I(b) by completing an Internal Revenue Form 8300. (See Appendix at 189; letter from Respondent Miller's counsel confirming that the Indiana Department of State Revenue is required to complete Form 8300 for cash payments in excess of $10,000). A Form 8300 is an information return that must be completed by the recipient of in excess of $10,000 in cash and requires the payor to disclose his identity, address, date of birth, social security number, passport number, alien registration number, and occupation under penalties of perjury(A fold-out duplicate of Form 8300 is included in the Appendix after page 189). The payor's refusal to provide the information as well as the recepient's failure to file the Form 8300 is a felony punishible by a sentence of up to five years.

(See 26 U.S.C. § 7203, appended at page 185). Even if the payor is an agent of the possessor of the controlled substances, a condition the Indiana Supreme Court found to rescue the CSET from the self-incrimination pitfall, the agent must disclose his principal in Part II of the Form 8300 under the same penalties of perjury discussed above.

It is clear that for the Hall's to have complied with the CSET and have paid the tax on the marijuana, they, and the Indiana Department of State Revenue, would have been required, under threat of a possible five year prison sentence, to complete a Form 8300, under oath, and that Form 8300 would have been provided to the Internal Revenue Service. Such a scenario certainly would subject the Halls to a "real and appreciable" risk of self-incrimination. For that reason the CSET, at least as to liabilities in excess of $10,000, violates the Hall's privilege against self-incrimination guaranteed them by the Fifth Amendment.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Indiana should be granted and the important question of first impression concerning the timing of the attachment of jeopardy in a civil case and of self-incrimination addressed by this Court.

March 26, 1996

Respectfully submitted,

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